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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 883

STATNI BANKA CESKOSLOVENSKA, *Petitioner,*

— against —

EDWIN B. WOLCHOK, as Receiver of Zivnostenska Banka, *Respondent.*

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIGMUND TIMBERG
Attorney for the Respondent
815 Fifteenth Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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INTRODUCTION

Petitioner's basic position is that, given the doctrine of separation of powers, the "unequivocal" suggestion of immunity by the State Department *in this case* requires the release, from the custody of the Court, of property standing in the name of Statni Banka speci-

fied by the State Department in its suggestion. This fallaciously simple statement of the issue is only possible because the petition either ignores or misconceives certain fundamental facts.

First, the property in question is in the custody of the Court, not by virtue *of this proceeding*, but by virtue of an *in rem* Final Judgment *in another case, Stephen* v. *Zivnostenska Banka,* which appellant does not, and cannot, ask this Court to review. Also, in the proceedings leading up to said Final Judgment, the issue of the immunity of petitioner Statni Banka and its property was conclusively adjudicated against it. Moreover, far from the State Department's attitude on Statni's immunity being unequivocal and in accord with the doctrine of separation of powers, its several communications to the Court on this subject have been mutually inconsistent and have shown unjustified encroachment by the Executive Branch on the judicial power.

To set the problem in its true perspective, it will be necessary to restate facts ignored by petitioner, but covered in the opinion of the Appellate Division, which was adopted by the Court of Appeals.*

STATEMENT

Stephen v. *Zivnostenska Banka* is an *in rem* action commenced under Section 977-b of the New York Civil Practice Act. At the outset of this action, the claim of immunity in respect of Statni's property was raised by a letter dated June 4, 1952, in which the State De-

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* The opinion of the Appellate Division in *Stephen* v. *Zivnostenska Banka* is reprinted on pages 11a to 24a of the petition, and references to it will take the form, e. g., of "Op. App. Div., p. 23a."

partment requested the Attorney General to instruct the appropriate U. S. Attorney to present to the Supreme Court for New York County (hereinafter referred to as the "Trial Court"), "without argument or comment," the position of the Czechoslovak government. That position, as set forth in a note from Czechoslovak Chargé d'Affaires, was that, as an organ of the Czechoslovak government, Statni Banka and its property enjoyed sovereign immunity. Following the receipt of this correspondence, the Court ordered its Referee to hear and report on, among other matters, the issue of Statni's immunity. In trying this issue and making his report, the Referee followed the criteria laid down in another State Department letter, the so-called Tate-letter of May 19, 1952, which set forth the general practice of the government of the United States in connection with sovereign immunity. Op. App. Div., p. 14a. That letter was appended as an annex to the Referee's report. (Record on Appeal from the Trial Court's Order of March 12, 1955, ff. 676-690).

In the litigation, counsel for Statni Banka, who appeared as *amicus curiae* and requested that the Court pass upon the issue of sovereign immunity, was given full opportunity to present evidence (*ibid.* ff. 729, 2177, 2181-90); cross-examine witnesses (*ibid.*, f. 624), enter exceptions (*ibid.*, 1515); make oral arguments and file briefs (*ibid.*, ff. 2198, 2265). After extensive hearings, the issue of sovereign immunity was determined adversely to Statni Banka, in conformity with the policy laid down in the above-cited State Department letter of May 19, 1952. It is to be noted that counsel conceded that there were transfers of property from Zivnostenska Banka to Statni Banka, its statutory successor. The order of the Trial Court confirming, *inter alia*, the Referee's ruling that Statni Banka and

its property were not entitled to sovereign immunity was entered March 25, 1955, and was sustained by the Appellate Division. Since the issue was abandoned in the subsequent appellate proceedings, it was, in the words of the Appellate Division in this, the most recent appeal, "litigated and determined" against Statni Banka. Op. App. Div., pp. 15a, 23a.

The Final Judgment in *Stephen* v. *Zivnostenska Banka* was entered on August 6, 1956, and the appellate litigation therefrom was concluded on March 10, 1958, when this Court dismissed the appeal from said Final Judgment, 356 U.S. 22. On June 22, 1959, fifteen months after this Court's action and almost three years after the entry of said Final Judgment, the State Department presented a suggestion of immunity in *Stephen* v. *Zivnostenska Banka*. Among the categories of securities and deposits for which immunity was claimed were those "deposited in the name of the Statni Banka Ceskoslovenska and Zivnostenska Banka, which the Czechoslovak Government claims to be its property." In reliance on this suggestion of immunity, a motion was made in the Trial Court to modify the Final Judgment of August 6, 1956. The trial Court denied that motion, as well as a later motion to renew the motion to modify, and these denials were sustained by the Appellate Division and the Court of Appeals (23 Misc. 2d 855, *aff'd* 15 App. Div. 2d 111, *aff'd* 12 N.Y. 2d 781). See Op. App. Div., pp. 16a-22a. No application to this Court for writ of certiorari has been made (see petition, p. 7), and the time for making such application has expired.

The present proceeding was commenced by a complaint filed by the Permanent Receiver, appointed pursuant to the August 6, 1956 Final Judgment, against Statni Banka, which is the statutory successor of

Zivnostenska Banka, the defendant under said judgment. It will clarify the issues in this case to set forth, in chronological order, the six letters from the State Department that are relevant to the issue of sovereign immunity as raised in this proceeding:—

1. On June 4, 1952, in *Stephen* v. *Zivnostenska Banka*, the State Department issued the letter, described on pages 2-3, above, which in effect referred the problem of Statni Banka's immunity to the Trial Court for its determination, without taking any position thereon.

2. The judicial determination, in *Stephen* v. *Zivnostenska Banka*, that Statni Banka and property standing in its name were not entitled to sovereign immunity was reached on the basis of a State Department letter of May 19, 1952, outlining the general position of the State Department with respect to sovereign immunity, see page 3, above.

3. On June 22, 1959, in *Stephen* v. *Zivnostenska Banka*, the State Department suggested immunity for assets standing in the name of Statni Banka. This suggestion, as pointed out earlier, was overruled by the New York courts, and the validity of this action is not subject to review by this Court (see page 4, above).

4. On June 22, 1959, the State Department issued the letter suggesting immunity in this proceeding that is relied on by petitioner.

5. On December 15, 1959, the State Department wrote a letter to the effect that its June 22, 1959 letter was not intended to deprive persons, making claim to specific property for which immunity had been claimed in the June 22 letters, of the opportunity of establishing that they in fact owned the securities (*ibid.*, pp. 20a, 21a.) This letter was found by the Trial Court to

be beyond the proper province of the Executive Department, because it created a hybrid standard of sovereign immunity and made sovereign immunity dependent on the nature of the person *against which* the claim of immunity was asserted rather than on the nature of the party or entity *on behalf of which* the claim was asserted (see the opinion of the Trial Court, Appendix A to this brief, pp. 6a-8a).

6. On May 12, 1960, the State Department addressed still another letter, in which it further trespassed on the judicial province. Specifically, that letter indicated that the State Department intended, by its June 22, 1959 and December 15, 1959 letters, that, in the proof made by any claimant of specific securities, Czechoslovak law was to apply, and that the claimant, rather than the Czechoslovak Government, had the burden of proof of establishing ownership. See Op. App. Div., pp. 21a, 22a and Appendix A, p. 8a hereto. Other phases of this unique letter are discussed later in this brief (see pp. 10-11, below).

The Trial Court originally, after the receipt of Letters 4 and 5, declined to follow the suggestion of immunity (see Statni Record, pp. 75-76). Subsequently, after receiving Letter 6, it entered an order dismissing the complaint and directing the release and discharge of Statni property from the restraints imposed by prior orders of the Court. The Appellate Division modified the order of the Trial Court for the reasons stated in its opinion in *Stephen* v. *Zivnostenska Banka*, by reversing and vacating the provision thereof which directed the release and discharge of property standing in the names of Zivnostenska Banka and Statni (15 App. Div. 2d 103; p. 10a of petition). This order was upheld by the Court of Appeals (12 N.Y. 2d 784; p. 5a of petition).

THE DECISION BELOW RESTS ON NON-FEDERAL GROUNDS

The petition is premised on the erroneous proposition that the suggestion of immunity with respect to Statni Banka presented to the Trial Court in *this* proceeding (State Department letter No. 4, p. 5, above) required not only the dismissal of the complaint in *this* proceeding (which was done), but also the release, from the custody of the court, of property standing in the name of Statni Banka. This ignores the fact that that property is in the custody of the court by virtue of an *in rem* Final Judgment (that of August 6, 1956), in *another* state court proceeding, *Stephen* v. *Zivnostenska Banka*, which is not subject to review here (see pp. 3-4, above). Since the refusal to release the property was based on such a final state court judgment, it rests on a non-federal ground.

Assuming *arguendo* that the Final Judgment of August 6, 1956, in *Stephen* v. *Zivnostenska Banka*, were otherwise subject to review by this Court in this proceeding, the Trial Court's denial of Statni Banka's claim of immunity (see pages 5 to 6, above) was *res judicata* and the law of the case and, as such, binding on the courts. See *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116. The denial of the claim "was conclusive and binding upon the parties as respects that controversy," and does not raise a federal question, *Pink* v. *United States*, 315 U.S. 203, 216.

Still a third indication that the issue raised by petitioner was decided on a non-federal ground is petitioner's argument, made to the appellate courts below and referred to on page 7 of the petition, that the dismissal of the complaint brought by the Permanent Receiver necessitated the dismissal of the order extending his receivership to assets standing in the name of Statni

Banka. This argument is based exclusively on considerations of New York law. The following authorities support the court below in upholding the continued functioning of the receiver in such a situation:—*Colwell* v. *Garfield National Bank*, 119 N.Y. 408; *Baksi* v. *Wallman*, 272 App. Div. 422, 752; *Williams* v. *Montgomery*, 148 N.Y. 519; *Whiteside* v. *Pendergast*, 2 Barb. Ch. 471, 474-3; *McCosker* v. *Brady*, 1 Barb. Ch. 329, 346; see also High on Receivers (4th Ed.), Secs. 437, 833; *Fountain* v. *Mills*, 111 Ga. 122; *Walker* v. *Gibson*, 37 Ill. App. 335.

It is accordingly clear that the New York courts' denial of petitioner's motion to release property standing in the name of Statni Banka may be predicated on alternative state law grounds, and does not raise a federal question.

THE PETITION FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION, OR AN ISSUE OF GENERAL IMPORTANCE

In addition to the fact that the issue raised by petitioner was decided on non-federal grounds, this case rests on its own peculiar and complicated facts. The petition otherwise fails to present a substantial federal question, or a federal question sufficiently important to justify review by this Court.

In the first place, reviewing the unusual series of State Department communications in this case (see pages 5 to 6, above), it seems clear that the State Department's position on sovereign immunity, for from being "unequivocal" (see pp. 4, 12 of the petition), might well be characterized as wavering, confused and contradictory. Also, the State Department's violations of the doctrine of separation of powers in

this case (noted on page 6, above), do not seem to square with petitioner's insistence on the applicability of that doctrine, which is basic to its position (see pp. 4, 5 and 14 of petition).

Contrary to petitioner's contention (see p. 10), the record shows that the procedure set forth in *Ex Parte Peru*, 318 U.S. 578, 588, 589, petitioner's main reliance, was followed in the present case. That case restates the rule that a claim of immunity may be presented to the court in one of two ways, (1) by appearance and defense in the suit, or (2) by recognition and allowance, and certification to the court, by the State Department. The latter was the procedure followed in the cases cited on page 9 of the petition. However, in *Stephen* v. *Zivnostenska*, the claim of immunity for Statni and its property was presented to the court in the first way, and "litigated and determined against it" (see pages 3 to 4, above). Moreover, the foreign sovereign consented to have its claim to immunity adjudicated by the court (see p. 3, above), and such a consent amounts to a waiver of its claim. See *Ex Parte Peru*, *supra*, at pages 589, 590; *Puerto Rico* v. *Ramos*, 232 U.S. 627, 632; *Matter of United States of Mexico* v. *Schmuck*, 293 N.Y. 264, 274.

Petitioner also relies on *United States* v. *Pink*, 315 U.S. 203, for the proposition that the retention of jurisdiction by the New York courts over property within the jurisdiction of New York State runs counter to a federal policy of attempting to obtain compensation for American citizens. As evidence of such a federal policy, it refers to Public Law 85-604. This law makes no reference to any properties held in the custody of state courts; it prescribes a procedure pursuant to which payments from a fund established in the U. S.

Treasury Department shall be disbursed to United States nationals.

Petitioner lays more stress on the May 12, 1960, letter of the State Department (Letter No. 6, p. 6, above), which it cites for the proposition that the release of the property of the Czechoslovak Government "was necessary to the conclusion of negotiations between the United States and Czechoslovakia for a settlement of the claims of American citizens arising from the nationalization program of the Czechoslovak Government" (see page 11 of the petition). The actual text of the letter refutes this proposition, for it makes it clear that agreement has in fact been reached between the Czechoslovak and the United States Governments on the basis "that the lump sum now agreed upon in principle in settlement of such claims will be reduced *pro tanto* by the market value of those properties" for which sovereign immunity has been suggested but which are not released. See Op. App. Div., p. 22a.

Petitioner's case in relying on the pendency of negotiations with the Czechoslovak Government for an overall claims settlement is no stronger now than when this Court dismissed the appeal in *Zivnostenska Banka* v. *Stephen*, 356 U.S. 22. It was then pointed out that negotiations for such a settlement had been pending since 1946. As indicated by the Appellate Division, the *Pink* case is not applicable except where the federal policy has taken the form of a compact or treaty with a foreign government (Op. App. Div. 23a, 24a; see also pp. 2a-3a, below and Respondent's Motion to Dismiss Appeal in *Zivnostenska Banka* v. *Stephen*, *supra*, pp. 4 to 7).

Another indication of the insubstantiality of the issue raised by petitioner is that the Foreign Claims Settlement Commission has completed the Czecho-

slovak claims program contemplated under Public Law 85-604 and rendered awards totaling $113,645,205.41, see letter from the Chairman of the Foreign Claims Settlement Commission, Appendix "B" hereto. By contrast, the total value of the listed securities covered by the State Department's letters relating to sovereign immunity in *both Stephen* v. *Zivnostenska Banka and* this proceeding is estimated to be from $250,000 to $350,000, see Zivnostenska Record, p. 208, the bulk of which is not involved in this proceeding. The alleged deprivation to claimants under the federal statute, assuming *arguendo* that this proceeding is the proper one to redress it, is *de minimis*.

The basic justification underlying the doctrine of sovereign immunity is to avoid the affront to the dignity of an independent national sovereign implicit in making it or its instrumentalities answerable to judicial process, see Lauterpacht, *The Problem of Jurisdictional Immunity of Foreign States*, 28 British Yearbook of International Law 220, 232 *et seq.* (1951); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 Amer. Journal of International Law 93 (1953). That purpose is obviously no longer possible of accomplishment, for petitioner and the property standing in its name had been in court for more than seven years before the State Department first issued a suggestion of immunity, close to four years ago. This case hardly seems to be the type of situation that would "imperil the amicable relations between governments and vex the peace of nations," upon which the courts' deference to the State Department's expressions of policy in the field of foreign relations is grounded, see *United States* v. *Pink*, 315 U.S. 202, 233.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

SIGMUND TIMBERG
Attorney for the Respondent
815 Fifteenth Street, N. W.
Washington 5, D. C.